Probil Sonati Development Sdn Bhd v Hodan-R Sdn Bhd (Lt CDR (B) Mohammed Azmi bin Mohd Said, respondent)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–23–33 OF 2005
MOHD HISHAMUDIN J
22 DECEMBER 2008

Administrative Law — Exercise of judicial functions — Bias — Test of real danger of bias — Purpose of disqualification — Whether judge should recuse himself

Civil Procedure — Contempt of court — Civil contempt by counsel — Counsel writing to Chief Justice of Malaya (CJ) alleging bias on part of High Court judge — Whether contents of letter to CJ constituted contempt in face of court — Whether judge in whose court contempt occurred empowered to hear and adjudicate over contempt proceeding — Whether counsel who wrote to CJ on instructions of his client exonerated from contempt

On 22 November 2006, the respondent a solicitor wrote a letter to the Chief Justice of Malaya ('CJ of Malaya) alleging, inter alia, bias on the part of the High Court judge ('the judge') in a civil suit initiated by the respondent's client, which was still pending before another court, and of how the respondent's client had lost confidence in this court. The purpose of the letter was to request that the CJ of Malaya advise the judge to recuse himself from hearing this case and to transfer the matter to another court. The contents of this letter gave rise to the present contempt proceedings against the respondent. By a notice to show cause dated 25 January 2007, issued pursuant to art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964, the respondent was asked to show cause why he should not be committed for contempt of court. At the hearing of the contempt proceedings the respondent raised five preliminary objections in relation to the notice to show cause. These objections were, inter alia, that it would be legally improper for the judge to hear this contempt proceeding because of the conflict of interest arising from a pending civil suit ('the pending civil suit') filed by the respondent's client against the judge. It was the respondent's defence that the letter which forms the basis of this charge did not amount to contempt of court because it was issued under the respondent's client's instructions. The judge had to therefore decide on the preliminary objections raised by the respondent before deciding on the charge of contempt against the respondent.

Held, finding the respondent guilty of contempt:

(1) There was no formal application by the respondent that provided a clear explanation as to why the judge should disqualify himself from hearing this contempt proceeding. The preliminary objection by the respondent was in essence, the respondent orally questioning the judge's impartiality in hearing this committal proceeding. In addition the subject matter of the present notice to show cause ie the respondent's letter had nothing to do with the pending civil suit to which the respondent was not a party (see paras 26–27).

(2) The purpose of an application for recussal or disqualification is to preserve the administration of justice from any suspicion of impartiality or of prejudgment. Therefore, in the present committal proceeding the respondent must show that there was a real danger of bias and not just a reasonable suspicion of bias on the part of the judge hearing the committal proceeding. However, the respondent in the present case had neither shown that there would be a real danger of bias nor that there was any substance in his preliminary objections. Moreover, the pending civil suit against the judge was dismissed as an abuse of the process of court and the respondent by applying to preclude the judge from hearing this committal proceeding was trying to take advantage of his own wrongdoing. That wrongdoing was the filing of a writ action against the judge that had been held to be frivolous, vexatious, scandalous and an abuse of the process of court, and the court would not allow a party to a judicial proceeding to take advantage of his own wrongdoing (see paras 24, 30 & 33).

(3) The contents of the respondent's letter to the CJ of Malaya constituted contempt in the face of the court or an act that scandalised the court because an allegation of bias against a judge constitutes contempt of court. It is also settled law that where the act complained of is a contempt in the face of the court, the judge in whose court the contempt occurred, is empowered to hear and adjudicate over the contempt proceeding (see paras 16 & 21).

(4) The respondent's explanation that he wrote the letter on his client's (the defendant's) instructions was highly unsatisfactory and did not exonerate him from the charge. If the respondent's client was dissatisfied with the judge's decision he had the avenue of appeal as provided for by the law and not the writing of a letter to the CJ of Malaya alleging bias on the part of the judge. Further, since the writer of the letter was an advocate and solicitor, ie a person who knows the law, it showed that he was acting in bad faith (see para 36).

[Bahasa Malaysia summary

Pada 22 November 2006, responden seorang peguamcara telah menulis

sepucuk surat kepada Hakim Besar Malaya ('HBM') yang mendakwa, antara lain, berat sebelah oleh hakim Mahkamah Tinggi ('hakim') di dalam guaman sivil yang dimulakan oleh anak guam responden, yang mana masih belum selesai di hadapan mahkamah yang lain, dan bagaimana anak guam responden telah hilang keyakinan terhadap mahkamah ini. Tujuan surat tersebut adalah untuk meminta HBM untuk menasihati hakim tersebut agar membebaskan dirinya daripada mendengar kes ini dan memindahkan perkara tersebut ke mahkamah lain. Isi kandungan surat tersebut telah membangkitkan prosiding penghinaan ini terhadap responden. Melalui satu notis tunjuk sebab yang bertarikh 25 Januari 2007, yang dikeluarkan menurut perkara 126 Perlembagaan Persekutuan dan s 13 Akta Mahkamah Kehakiman 1964, responden telah diminta untuk menunjukkan sebab mengapa responden tidak seharusnya dikomit bagi penghinaan mahkamah. Ketika pendengaran prosiding penghinaan tersebut responden telah membangkitkan lima bantahan awal berkenaan dengan notis tunjuk sebab tersebut. Bantahan-bantahan ini adalah, antara lain, bahawa tidak sesuai dalam undang-undang bagi seorang hakim untuk mendengar prosiding penghinaan ini kerana konflik kepentingan yang timbul daripada guaman sivil yang belum selesai ('guaman sivil yang belum selesai') yang telah difailkan oleh anak guam responden terhadap hakim tersebut. Adalah pembelaan responden bahawa surat yang menjadi asas dakwaan tidak merupakan penghinaan mahkamah kerana ianya telah dikeluarkan di atas arahan anak guam responden. Oleh yang demikian hakim tersebut perlu memutuskan atas bantahan awal yang ditimbulkan oleh responden sebelum memutuskan dakwaan penghinaan terhadap responden.

Diputuskan, mendapati responden bersalah atas penghinaan:

(1) Tidak terdapat permohonan rasmi oleh responden yang memberikan penjelasan yang jelas berkenaan dengan mengapa hakim tersebut patut tidak melayan dirinya daripada mendengar prosiding penghinaan ini. Bantahan awal oleh responden adalah pada dasarnya, responden secara lisan mempersoalkan ketidakadilan hakim di dalam pendengaran prosiding komital ini. Selanjutnya, perkara utama notis tunjuk sebab ini iaitu surat responden tidak berkaitan dengan guaman sivil yang belum selesai di mana responden bukannya pihak yang terlibat (lihat perenggan 26–27).

(2) Tujuan permohonan untuk membebaskan atau menarik diri adalah untuk mengekalkan pentadbiran keadilan daripada mana-mana kesangsian ketidakadilan atau prapertimbangan. Oleh itu, di dalam prosiding komital ini responden mestilah menunjukkan terdapat bahaya sebenar berat sebelah dan bukan hanya kesangsian berat sebelah yang munasabah di pihak hakim yang mendengar prosiding komital.

Walau bagaimanapun, responden di dalam kes ini tidak menunjukkan adanya bahaya sebenar berat sebelah mahupun terdapat apa-apa yang kukuh di dalam bantahan awalnya. Selanjutnya guaman sivil yang belum selesai terhadap hakim tersebut telah ditolak kerana menyalahgunakan proses mahkamah dan responden dengan memohon untuk menghalang hakim daripada mendengar prosiding komital ini cuba untuk mengambil kesempatan ke atas kesalahannya sendiri. Kesalahan tersebut adalah pemfailan tindakan writ terhadap hakim yang telah diputuskan sebagai remeh, menyusahkan, melampau dan satu penyalahgunaan prosiding kehakiman untuk mengambil kesempatan ke atas kesalahannya sendiri (lihat perenggan 24, 30 & 33).

(3) Isi kandungan surat responden kepada HBM membentuk penghinaan terhadap mahkamah atau satu tindakan yang memeranjatkan mahkamah kerana dakwaan berat sebelah terhadap seseorang hakim membentuk penghinaan mahkamah. Ianya juga adalah undang-undang yang tetap di mana tindakan yang diadukan adalah penghinaan jelas terhadap mahkamah, hakim di mahkamah di mana penghinaan berlaku diberi kuasa untuk mendengar dan menghukum terhadap prosiding penghinaan tersebut (lihat perenggan 16 & 21).

(4) Penjelasan responden yang dia menulis surat tersebut atas arahan anak guamnya (defendan) adalah tidak begitu memuaskan dan tidak melepaskan dia daripada dakwaan. Jika anak guam responden tidak berpuas hati dengan keputusan hakim, ianya mempunyai ruang untuk merayu seperti yang diperuntukkan oleh undang-undang dan bukannya menulis surat kepada HBM dengan mendakwa berat sebelah di pihak hakim. Selanjutnya, oleh kerana penulis surat adalah peguambela dan peguamcara, iaitu seseorang yang mengetahui undang-undang, ianya menunjukkan bahawa responden bertindak dengan niat buruk (lihat perenggan 36).]

Notes

For cases on bias, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 109–114.
For cases on civil contempt by counsel, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1763–1764.

Cases referred to

Dato' V Kanagalingam v David Samuel & Ors [2006] 6 MLJ 521; [2006] 3 CLJ 909, HC (refd)
Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213, CA (refd)
Hodan-R Sdn Bhd v Dato' Mohd Hishamudin bin Hj Mohd Yunus [2007] 4 AMR 421, HC (refd)
Kumaraendran, an Advocate & Solicitor, Re [1975] 2 MLJ 45, HC (refd)
McKeown v The Queen (1971) 16 DLR (3rd) 390 (refd)

Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara [2002] 1 MLJ 321; [2001] 4 CLJ 701, FC (refd)
PP v Seeralan [1985] 2 MLJ 30, SC (refd)
Queen v Gray, The [1900] 2 QB 36, DC (refd)
Reg v Gough [1993] AC 646, HL (refd)

Legislation referred to
Courts of Judicature Act 1964 s 13
Federal Constitution art 126
Rules of the High Court 1980 O 18 r 19, O 52

Murali Achan (K Kulasekar Achan & Associates) for the plaintiff.
Respondent in person.
Azizah bt Nawawi (Senior Federal Counsel, Attorney General's Chambers), for the Attorney General as amicus curiae.
Robert Lazar (Shearn & Delamore), for the Bar Council as amicus curiae.

Mohd Hishamudin J:

[1] By a notice to show cause dated 25 January 2007, the respondent, who is both the solicitor and counsel in the present case, was asked to show cause as to why he should not be committed for contempt of court. The notice states:

NOTIS TUNJUK SEBAB

(Menurut Perkara 126 Perlembagaan Persekutuan, seksyen 13 Akta Mahkamah Kehakiman 1964 dan Aturan 52 Kaedah-Kaedah Mahkamah Tinggi 1980.)

AMBIL PERHATIAN bahawa kamu Lt. Cdr (B) Mohammed Azmi bin Mohd Said dari Tetuan Mohammed Azmi & Associates adalah dikehendaki hadir di hadapan Hakim di Mahkamah terbuka pada 12hb. Februari 2007 pada jam 11.30 pagi untuk menunjuk sebab mengapa kamu tidak boleh dihukum dengan hukuman penjara atau hukuman denda atas kesalahan menghina Mahkamah berasaskan pertuduhan berikut:

BAHAWA kamu selaku peguambela dan peguamcara bagi pihak defendan (Hodan-R Sdn Bhd) telah menulis sepucuk surat rujukan MA/CIV/2005-HODAN-R bertarikh 22 November 2006, sepertimana dilampirkan pada notis ini, kepada YAA Hakim Besar Malaya, yang mengandungi perkataan-perkataan, khususnya di paragraf 2 dan 3 surat tersebut, yang sekiranya dibaca di dalam konteks surat tersebut secara menyeluruh, memberi suatu gambaran yang tidak benar, iaitu, bahawa YA Hakim dan Penolong Kanan Pendaftar dengan sengaja dan dengan niat jahat telah tidak berlaku adil dan tidak akan berlaku adil terhadap anakguam kamu di dalam mengendalikan apa jua prosiding di dalam kes ini.

Bertarikh pada 25hb. Januari 2007.

Datin Anita Harun
Timbalan Pendaftar
Mahkamah Tinggi Malaya
Kuala Lumpur

Kepada:

1. Lt. Cdr (B) Mohammed Azmi bin Mohd Said
Tetuan Mohammed Azmi & Associates
130-1, Jalan Toman 6, Kemayan Square
70200 Seremban
Negeri Sembilan Darul Khusus

2. Y.Bhg. Peguam Negara Malaysia
Jabatan Peguam Negara
Aras 3, Block C3
Pusat Pentadbiran Kerajaan Persekutuan
Putrajaya

3. Tetuan K. Kulasekar, Achan & Associate
Peguambela & Peguamcara
No. 23/59, Jalan Aman
46000 Petaling Jaya
Selangor Darul Ehsan

4. Presiden
Majlis Peguam Malaysia
13, 15 dan 17
Leboh Pasar Besar
50500 Kuala Lumpur

[2] The above notice was issued pursuant to art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964. Article 126 states:

Power to punish for contempt.

126 The Federal Court, the Court of Appeal or a High Court shall have power to punish any contempt of itself.

[3] Section 13 of the Courts of Judicature states:

Contempt.

13 The Federal Court, the Court of Appeal and the High Court shall have power to punish any contempt of itself.

[4] The respondent's letter dated 22 November 2006 to the Chief Judge of Malaya which is the subject-matter of, and annexed to, the above notice to show cause reads:

MOHAMMED AZMI & ASSOCIATES

ADVOCATES & SOLICITORS/PEGUAMBELA & PEGUAMCARA

130-1, Jalan Toman 6, Kemayan Square

70200 Seremban, Negeri Sembilan Darul Khusus

Tel: 06-7621179 Fax: 06-7673261 H/P: 012-2140180

Lt.Cdr (Rtd) Mohammed Azmi bin Mohd Said

Ruj.Kami: MA&A/CIV/2005-HODAN-R

Ruj.Tuan: S3-23-33-2005

Tarikh: 22-11-2006

Y.A.A. Hakim Besar Malaya

Mahkamah Persekutuan Malaysia

Palace of Justice

Presint 3

62506 Putrajaya

HANTAR TANGAN

Yang Amat Arif Tan Sri,

Dalam Mahkamah Tinggi Malaya Di Kuala Lumpur

Guaman Sivil No: S3-23-33-2005

Probil Sonati Development Sdn Bhd lwn Hodan-R Sdn Bhd

Dengan segala hormatnya, saya merujuk kepada perkara di atas.

2. Sehubung dengan perkara tersebut, anakguam kami amat runsing terhadap beberapa perkara yang telah pun dialami oleh anakguam kami di Mahkamah Tinggi Sivil 3. Implikasi dari itu, anakguam kami telah hilang kepercayaan terhadap Y.A. Hakim dan telah menyaman Y.A. Hakim melalui tindakan S7-22-992-2006. Sesalinan Writ terhadap Y.A. Hakim tersebut telah pun dibekalkan kepada Y.A.A. Tan Sri. Adalah jelas bahawa anakguam kami akan tetap menjadi mangsa kepada Y.A. Hakim dan Penolong Kanan Pendaftar Mahkamah Tinggi Kuala Lumpur Sivil 3.

3. Memandangkan bahawa terdapat beberapa permohonan yang masih tergantung di Mahkamah Sivil 3, kami dapat meramalkan bahawa semua keputusan akan memihak kepada pihak lawan. Kami juga mempunyai wasangka bahawa anakguam kami terus menjadi mangsa kepada semua permohonan yang akan didengarkan oleh Y.A. Hakim dan Penolong Kanan Pendaftar Mahkamah Tinggi Sivil 3.

4. Sebagai contoh, baru-baru ini pada 10.11.2006 kami telah masukkan Sijil Perakuan Segera di Kandungan 80 untuk mempercepatkan Kandungan 59 untuk merekodkan suatu penghakiman, tetapi Sijil Perakuan Segera kami tidak mendapat sebarang layanan yang sewajarnya. Kami percaya bahawa sekiranya penghakiman Kandungan 59 direkodkan, sudah tentu semua permohonan dan kes ini akan berakhir.

5. Adalah menjadi amalan bahawa apabila seseorang Hakim itu di saman oleh 'litigant', maka dengan sendirinya, Hakim tersebut hendaklah mengundurkan dirinya secara sukarela dan demi kepentingan keadilan membebaskan dirinya dariapda mendengarkan kes tersebut. Dalam kes ini, Hakim tersebut masih mempunyai niat untuk terus mendengar kes tersebut. Dalam apa cara jua pun anakguam kami telah hilang kepercayaan terhadap Hakim dan Penolong Kanan Pendaftar tersebut dalam menguruskan kes tersebut akibat dari kesan urutan kejadian yang telah berlaku.

6. Justeru itu, kami memohon jasa baik Y.A.A. Tan Sri supaya dapat menasihatkan Y.A. Hakim dan Penolong Kanan Pendaftar untuk mengundur diri atau membebaskan dirinya daripada kes ini demi kepentingan keadilan dan seterusnya dapat menukarkan kes ini ke Mahkamah yang lain.

Sekian, terima kasih.

Yang benar,

t.t.

Tetuan Mohammed Azmi & Associates

s.k

Y.A. Hakim

Mahkamah Tinggi Sivil 3

Kuala Lumpur

Penolong Kanan Pendaftar

Mahkamah Tinggi Sivil 3

Kuala Lumpur

Tetuan K.Kulasekar, Achan & Associate

Peguambela & Peguamcara

No. 2, 3/590, Jalan Aman

46000 Petaling Jaya

Selangor Darul Ehsan

[5] It is to be observed that the above letter was copied to the judge and the senior assistant registrar of the Kuala Lumpur High Court—to be precise, High Court No 3 of the Civil Division; that is, this court. Hence, I (and so is the senior assistant registrar) am directly aware and is in full knowledge and cognisance of the content of the letter which forms the basis of this proceeding.

[6] The above notice to show cause was issued to the respondent by the deputy registrar on my direction pursuant (as already said above) to the powers under art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act. I so directed because I was of the view that the content of the letter, in particular, paras 2 and 3, is, prima facie, in contempt of court.

[7] The letter alleges, inter alia:

(1) bias on my part as a judge of this court as a result of a civil suit initiated by the respondent's client which is still pending before another court;

(2) that the respondent's client will continue being a 'victim' and will never get a fair hearing;

(3) that it is predicted that all pending applications before this court will be decided against the respondent's client; and

(4) that in any event, the respondent's client has lost confidence in this court.

[8] The purpose of the letter was to request that the Chief Judge of Malaya advise me (the judge) and the senior assistant registrar of this court to recuse ourselves from hearing this case, and to transfer this matter to another court.

[9] The notice to show cause was fixed for hearing on 12 February 2007.

[10] On that day the respondent appeared in person (the respondent was advised by the court to engage a counsel in view of the seriousness of the matter; however, he insisted in appearing in person). Puan Azizah bt Nawawi, senior federal counsel, appeared on behalf of the attorney general, as amicus curiae; Encik Robert Lazar appeared on behalf of the Bar Council, also as amicus curiae; and Encik Murali Achan as counsel for the plaintiff.

[11] At the commencement of the hearing, after the notice to show cause was read out to the respondent by an officer of the court, the respondent said that he apologised to the court if his letter had slighted the court. I had thought that with that apology that was the end of the matter. But I was wrong. For, immediately after having apologised, the respondent proceeded to raise five preliminary objections in relation to the notice to show cause. In view of the preliminary objections, I then ruled that the preliminary objections raised would be dealt first by the court before I hear the merits of the notice to show cause. Accordingly, I proceeded to hear his preliminary objections.

[12] In brief, the five preliminary objections raised by the respondent are as follows:

(i) That it is not appropriate for me to preside over this contempt proceeding, due to a conflict of interest arising out of a pending civil suit filed by the respondent's client against me.

(ii) That no applicant has been named in the notice to show cause.

(iii) That the notice to show cause is defective as it does not fulfill the requirements of O 52 of the Rules of the High Court 1980.

(iv) That the charge against the respondent is defective as it does not state the offence and the punishment.

(v) That the respondent's letter dated 12 November 2006, which forms the basis of the charge against the respondent, does not amount to contempt of court as the same was issued under his client's instructions and was only seeking an instruction from the Chief Judge of Malaya.

[13] After hearing the respondent's preliminary objections, due to time constrains, I directed that the submissions of the other three counsel on the preliminary objections be heard on 22 March 2007. In the meantime, I directed the three counsel to file and serve their respective written submissions, and the respondent to file and serve his reply submission.

[14] However, the continued hearing of the preliminary objections could not be heard on that 22 March 2007 because the respondent was taken ill. A new date was given for the continued hearing: 4 May 2007.

[15] However, on 13 March 2007, an event happened that had a bearing on the first preliminary objection. But I will touch on this event at a later part of this judgment.

[16] In my judgment, the content of the above letter, prima facie, constitutes contempt in the face of the court or an act that scandalised the court.

[17] In *The Queen v Gray* [1900] 2 QB 36, the court held (at p 40):

> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke LC characterised as 'scandalising a court or a judge'.

[18] In *Re Kumaraendran, an Advocate & Solicitor* [1975] 2 MLJ 45, the court defined contempt in the face of the court as follows (at p 47):

> Contempt in the face of the court has been, in my view, aptly defined by Laskin J in his dissenting judgment in the Canadian Supreme Court case of *McKeown v The King* when he said:
>
> > Contempt in the face of the court is, in my view, distinguished from contempt not in its face on the footing that all the circumstances are in the personal knowledge of the court. The presiding judge can deal summarily with the matter without the embarrassment of having to be a witness to issues of fact which may be in dispute because of events occurring outside.
>
> Lord Denning MR in *Balogh v St Albans Crown Court* said:
>
> > So 'contempt in the face of the court' is the same as 'contempt which the court can punish of its own motion'. It really means 'contempt in the cognisance of the court'.

[19] It is the law, based on the authorities, that an allegation of bias against a judge constitutes contempt of court. In *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, it was held by the Court of Appeal as follows (at pp 225–226):

> The law will not suppose a possibility of bias in a judge who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea: 3 B1 Comm 361. In consequence, the court has regarded with particular seriousness allegations of partiality or bias on the part of a judge or a court as punishable contempts of court: see 9 *Halsbury's Laws of England* (4th Ed) at p 21.
>
> ...
>
> In *R v New Statesman, ex p Director of Public Prosecutions* (1928) 44 TLR 301, it was held that an imputation of unfairness and lack of impartiality to a judge in the discharge of his judicial duties constitutes contempt of court ...

A ...

And at p 303, the Lord Chief Justice concluded thus:

> ... the court had no doubt that the article complained of did constitute a contempt. It imputed unfairness and lack of impartiality to a judge in the
B discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial duties.

[20] Similarly in *Public Prosecutor v Seeralan* [1985] 2 MLJ 30, the
C Supreme Court held (at pp 32–33):

> ... An allegation of bias, in our opinion, is not just a mere act of discourtesy, but a contempt of court (*Re Kumaraendran, Reece v McKenna, ex parte Reece*, cited in Borrie and Lowe's *Law of Contempt*, 2nd Ed, at p 30).

D

[21] It is settled law that where the act complained of is a contempt in the face of the court, the judge in whose court the contempt occurred, is empowered to hear and adjudicate over the contempt proceeding.

E **[22]** In *McKeown v The Queen* (1971) 16 DLR (3rd) 390, it was held (at p 408):

> Contempt in the face of the court is, in my view, distinguished from contempt not in its face on the footing that all the circumstances of the alleged contempt are in
F the personal knowledge of the court. The presiding judge can then deal summarily with the matter without the embarrassment of having to be a witness to issues of fact which may be in dispute because of events occurring outside.

[23] Reverting to the preliminary objections, I shall only deal with the first
G preliminary objection of the respondent: that it is legally improper for me to hear this matter as there will be a conflict of interest, since I have been sued by the defendant (the respondent's client) in the present case in the Kuala Lumpur High Court Civil Suit No D5–22–1661 of 2006 ('the D5 suit'), a case that will be heard by the judge of Court No 5 of the commercial division.
H In the D5 suit, the present defendant is the plaintiff; and I, the defendant. The writ and statement of claim was filed and served on me by the respondent's firm, Messrs Mohammed Azmi & Associates.

[24] The purpose of an application for recusal or disqualification is to
I preserve the administration of justice from any suspicion, be it of absence of impartiality or of pre-judgment.

[25] Both Puan Azizah, senior federal counsel, and Encik Robert Lazar of the Bar Council (I wish to repeat here that both of them appear as amicus curiae) submitted that there is no sufficient cause shown to justify me to recuse myself. Encik Murali Achan, who appears for the plaintiff, also takes the same view.

[26] I have dismissed this preliminary objection. Firstly, there is no formal application by the respondent herein that contains a clear explanation as to why I should disqualify myself from hearing this contempt proceeding; particularly, bearing in mind that the plaintiff in the D5 suit is not the respondent himself; the plaintiff there being merely the respondent's client. Instead, the respondent is raising it merely orally and as part of his preliminary objection. In essence, the respondent is questioning the impartiality on my part in hearing this committal proceeding.

[27] Secondly, the subject matter of present notice to show cause (that is the respondent's letter) has nothing to do with the D5 suit.

[28] Now, on this issue of the likelihood of bias, the principle has been clearly laid down by the Federal Court in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2001] 4 CLJ 701. The court held that the test on bias is whether there is a real danger of bias. Suspicion or even reasonable suspicion is not enough. In this case cited, Mohamed Dzaiddin CJ said (at p 706):

> In our view, on the facts submitted by counsel and the reasons given by the learned trial judge in the grounds of judgment (at p 601 of the appeal record), there is no real likelihood of danger, in the sense of a real possibility, of bias on the part of the learned judge when he heard the habeas corpus application. We concede that the only common factor between the appellants and the 'Black 14' judgment of the learned judge is that the appellants were detained by the respondent for organising demonstrations one of which was on 14 April 2001 which became the foundation for the 'Black 14' allegation of the respondent. However, we do not think such circumstances do give rise to a real danger of bias on the part of the learned judge.

[29] The Federal Court in *Mohamed Ezam* applied the English position in *Reg v Gough* [1993] AC 646. The test as formulated by Lord Goff is as follows (at p 670):

> Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration ...

[30] Therefore, in this committal proceeding that is now before me, the respondent must show that there is a real danger of bias, and not just a reasonable suspicion of bias on my part to hear this contempt proceeding. It is my finding that the defendant has failed to convince me that there would be a real danger of bias.

[31] Now, in the present case, far from showing any real danger of bias, there is actually no substance at all in the preliminary objection. This is because what had happened was that before arguments on the preliminary objection could be continued on 4 May 2007, on 13 March 2007, in the D5 suit, the learned judge (Ramly Ali J) had dismissed the defendant's (who is the plaintiff in that suit) action against me with costs on the grounds that the defendant had failed to disclose any cause of action and that the defendant's suit was scandalous, frivolous and vexatious and an abuse of the process of court. The judgment of Ramly Ali J is reported in *Hodan-R Sdn Bhd v Dato' Mohd Hishamudin bin Hj Mohd Yunus* [2007] 4 AMR 421. At p 435 of the judgment the learned judge said:

> On the above considerations the court is satisfied that the plaintiff's action against the defendant discloses no cause of action; scandalous, frivolous and vexatious. It is also an abuse of the process of the court. The court also finds that this is the most appropriate case for the court to exercise its judicial discretion to strike out the case at this stage and not to allow it to go for full trial.
>
> It is crystal clear that the plaintiff's claim is doomed to fail right from the outset. To let the claim to proceed for trial would mean the court is allowing itself to be a party to the absurdity created by the plaintiff. It will not only embarass the defendant as a judge, but also the whole judicial system or administration of justice of the country.

[32] I must also add that the fact that the D5 suit against me was an abuse of the process of court is also clearly shown by the fact that both the respondent and his client (the plaintiff in the D5 suit) were absent when the attorney general's application to strike out the plaintiff's action pursuant to O 18 r 19 of the Rules of the High Court 1980 was heard before Ramly Ali J on 13 March 2007.

[33] Now, I would even go further to hold that by applying to preclude me from hearing this proceeding the respondent is trying to take advantage of his own wrongdoing. That wrongdoing is the filing of a writ action against me that has been held by a court of law to be frivolous, vexatious, scandalous and an abuse of the process of court. It is a basic principle of law that is rooted in the common law that the court will not allow a litigant or a party to a judicial proceeding to take advantage of his own wrongdoing (see *Dato' V Kanagalingam v David Samuel & Ors* [2006] 6 MLJ 521; [2006] 3 CLJ 909).

[34] In the present case, I have also dismissed the remaining four preliminary objections of the respondent. I do not propose to discuss them as I think they are clearly devoid of any merit.

[35] Having disposed of the preliminary objections, I then called upon the respondent to answer the notice to show cause. In summary, this was what the respondent said. He explained that when he wrote the letter to the Chief Judge, Malaya, he was only doing what he was instructed to do by his client, that is, the defendant in the present case. The respondent then went on to dispute the correctness of my decision and of the registrar's decision in the hearing of certain interlocutory applications in the present case. He added that paras 2 and 3 of his letter to the Chief Judge are the manifestation of his (as swell as the defendant's) grievance over the decisions made. The respondent explained that he had no intention to be in contempt of court but was genuinely of the belief that what he had stated in paras 2–3 of the letter is the 'truth': that the registrar and I were 'wrong' in our decisions.

[36] In my judgment the above explanation is highly unsatisfactory and does not exonerate the respondent from the charge. It hardly needs to be told or reminded, that if the respondent's client was dissatisfied with any decision on an interlocutory application be it that of the registrar or that of the judge, the defendant has the avenue of appeal as provided for by the law. That is the rule; that is the system of administration of justice that we subscribe to. No litigant can do as he pleases, such as writing a letter to the Chief Judge alleging bias on the part of a judge (or registrar) without any basis at all, just because he is dissatisfied with the decision of the judge or registrar; and all the more so in the present case where the writer of the offending letter is an advocate and solicitor, a person who knows the law. What was done by the respondent was clearly mischevious and in bad faith — to put it mildly.

[37] Accordingly, I found the respondent guilty of contempt as per the show cause notice, and I convicted him.

[38] In mitigation the respondent informed the court that he had no intention of scandalising the court; that he was deeply sorry for what had happened; that he was married with one child; that he had only a small practising firm and that should he be sent to prison it might adversely affect his career as a lawyer. He prayed for leniency.

[39] Having considered the above plea and balanced it with the seriousness of the offence, I imposed a fine of RM10,000 in default, three months' imprisonment.

[40] The respondent found guilty of contempt and sentenced accordingly.

Respondent found guilty of contempt and sentenced accordingly.

Reported by K Nesan